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TAGS: PGOV PREL PINR UP
SUBJECT: UKRAINE: YUSHCHENKO PUSHES AHEAD WITH
CONSTITUTIONAL REFORM

REF: KYIV 04290 06

Classified By: Political Counselor Kent Logsdon for reasons 1.4(b,d).

¶1. (SBU) Summary. President Yushchenko is moving forward with his plans to further amend the constitution in an effort to clarify poorly written articles, but constitutional experts are not convinced that this process will succeed. Yushchenko issued a decree in late December 2007 forming the National Constitutional Council (NCC) and since then the Presidential Secretariat has received more than 230 nominations for members for the Council from political parties, regional government, and civil society organizations. The President will now select the membership and the group should convene for the first time in February. However, the Civic Constitutional Committee (CCC), a group of respected NGO and think tank leaders, has warned publicly and told us privately that the President's short timeline -- the goal is a constitution ready for referendum on June 28, 2008 (Ukraine's Constitution Day) -- and his direct control over the process make the possibility of a high-quality, consensus-based constitutional draft unlikely. The experts we spoke with, not surprisingly, credited Presidential Secretariat Head Baloha with pushing the aggressive timeline

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and a process aimed at benefiting the President. They instead advocate a Constitutional Assembly, comprised of elected representatives, who would have civil society backing to consider a draft and put it up for a referendum, but on a much slower timeline.

¶2. (C) Comment. We will have a better sense of how this process will work after Yushchenko selects the members of the Council and they hold their first meeting. If Yushchenko includes the political opposition and a broad range of non-governmental experts, it will indicate that he is seeking a broad-based reform process based on consensus. On the other hand, if he tries to ram a draft written by his Secretariat through the process by the end of June without

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obtaining a broad consensus, his critics will interpret this as showing a lack of commitment to needed reforms in favor of strengthening the President's political position. Ukraine's constitution remains deeply flawed by the hastily-drafted and approved amendments made to it in 2004 during the Orange Revolution that came into force on January 1, 2006. Real changes could be one more step on Ukraine's path to Europe, but amendments that result in superficial alterations to the balance of power could end up continuing the political conflicts that have plagued Kyiv for the past year and a half. End summary and comment.

NCC: First Step Forward or Presidential Tool?

13. (SBU) Further amendment of the constitution has been a constant subject of discussion by senior politicians since the reforms were adopted on December 8, 2004 (reftel), but Yushchenko's new National Constitutional Council (NCC) is the first concrete attempt to move the process forward. The President announced the NCC December 5, 2007, at a meeting with NGO leaders and local government officials, pledging to make 2008 the year of constitutional reform. He called for the Council to be nonpartisan and said it should involve the Rada, local government, and civil society. On December 27, he issued the formal decree establishing the NCC. In the decree, it says the task of the NCC is to overhaul and draft a new constitution. The President chairs the Council, with members selected by the President from nominations submitted by all Rada factions, other political parties, the Crimean parliament, the oblast administrations (including Kyiv and Sevastopol), the National Academy of Science, and national-level human rights groups and called for nominations by January 15. The decree also calls for the process to be open and for the draft to be assessed by the Venice Commission. It also specifies that two-thirds of the Council composition must be present to have a quorum at a meeting, simple majority votes are needed with the Council Chairman (i.e. President Yushchenko) casting the tie-breaking vote if needed, and Council decisions can be enacted through presidential decree. (Embassy Note: The current constitution addresses only the required procedures for amending the document; it is silent on how to approach the drafting of a new constitution. End Note.)

14. (SBU) In total the Secretariat has received more than 230 nominations, although the decree does not specify how many members will actually be selected. On January 24, Deputy Presidential Secretariat Head Stavnichuk, who is helping coordinate the process, told the press that each political force will have no more than eight members and that "all political parties would have equal conditions." Yushchenko

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held a meeting with the leaders of all political forces on January 22 to discuss the Council's creation and membership. The meeting was attended by all Rada faction leaders, Presidential Secretariat Head Baloha, Deputy Head of the Secretariat Stavnichuk, and NSDC Secretary Bohatyryova

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Tymoshenko did not attend -- she canceled several meetings at that time because she was ill -- instead sending DPM Vasyunyk in her place, according to press reporting.

15. (SBU) Rada Speaker Yatsenyuk has been very supportive of the President's initiative, encouraging all parties to get their nominations in on time. On January 16, at a local conference, he warned that the constitution cannot be constantly changed to suit every political force or situation and it is not a tool to be used by the coalition or opposition for political gain. Yatsenyuk praised Yushchenko's initiative to set up the NCC, saying it "is the right approach to introduce phased-in and very balanced" changes to the constitution. He urged all political forces to seek consensus on the process and to remember that it is a national document.

Civic Constitutional Committee: Looking at the Process

16. (SBU) A group of NGO and think tank leaders in October 2007 formed the Civic Constitutional Committee in order to advocate for constitutional reform. In separate meetings with three members -- Ihor Kohut of the Laboratory of Legislative Initiatives, Ihor Koliushko, former legal analyst for the Secretariat and now head of the Center for Political and Legal Reforms, and Volodymyr Horbach from the Institute for Euro-Atlantic Cooperation -- they all said that the committee's purpose is to advocate for reform, increase civil

society's role in the process, and provide recommendations on the best procedure for amending the constitution. They all underscored that they were not working on the substance of actual reforms. Horbach added that if civil society plays a role in reforming the constitution, they will act as a moral compass to keep politicians within the new constitutional framework. The 1996 constitution, for better or for worse, was a compromise and consensus-based and it lasted 10 years.

President's NCC Too Politicized

¶7. (SBU) Horbach said that while the President was headed in the right direction with the NCC, he was not going about it the right way. To truly amend the constitution, there needed to be consensus among all political forces and support from the people. Therefore, the NCC, which is being managed by the Secretariat and staffed mainly by politicians appointed by their parties, would not inspire confidence. Koliushko agreed that the most dangerous way to amend the constitution would be to allow the politicians at the top level to simply divvy up power and amend the constitution to their own benefit. If Ukraine is going to adopt a new constitution, he argued, they should bring in civil society from the beginning, in order to give the people a sense of ownership over the new constitution.

¶8. (SBU) Horbach said that the view of rule of law, both at the elite and public levels, was that laws are flexible and can be ignored or contravened when inconvenient. Moreover, the constitution had taken serious beatings -- when it was amended unconstitutionally in 2004, when Yushchenko disbanded the Rada in 2007, and when political forces were blockading and manipulating the Constitutional Court in both 2006 and ¶2007. Koliushko said that for a long time he had thought that the flaws in the current constitution could be fixed through legislation, but that had not worked.

¶9. (SBU) Horbach and Koliushko told us that that the Secretariat's goal for the NCC was to have something ready

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for a referendum to be held on June 28, 2008 (Ukrainian Constitution Day). Horbach said that every department in the PS was now working on constitutional reform -- it was their top priority. Horbach said that he understood the presidential team's plan was to develop a constitution that solidified the President's top position in Ukraine, but gave the prime minister enough power in order to convince Tymoshenko to stay put and not run for President in 2009/2010. Given the fragility of the coalition, the PS was hurrying as fast as it could to get a draft into play. Koliushko doubted that a draft could be reviewed by the Venice Commission, as instructed in the presidential decree, and still be ready by June. He thought that Yushchenko himself did not really know how this would play out. Koliushko also was concerned that the presidential team had

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its own agenda, i.e. power -- this was also evident, he said, in some of the bills the Secretariat had recently submitted to the Rada, particularly the draft law on the Cabinet of Ministers. In addition, he expressed concern that Yushchenko could set a precedent that could open the path for every future President to amend the constitution to his or her liking.

¶10. (SBU) Both Horbach and Koliushko believed that if presidential opponents on the NCC objected to Yushchenko's draft or tried to put up their own versions for a vote, he might just pull the plug on the whole project. The worst case scenario would be if the presidential team pushed their draft through the referendum over objections and then certain regions of the country, such as Donbas and Crimea, refused to accept it. When asked whether the presidential team was

thinking about their European aspirations and image when pushing constitutional reform so quickly, Koliushko said that Baloha, who is driving the process, acts first, thinks second. Koliushko said Baloha has been successful in this approach so far, but it is a risky strategy. Horbach thought it likely that the political sides could continue to fix constitutional inconsistencies and contradictions through legislation, like the CabMin law. Horbach pointed out that President Kuchma, with far more power than Yushchenko has now, had tried to force amendments to the constitution and failed; how could Yushchenko hope to succeed without consensus?

Constitutional Assembly: A Better Alternative?

¶11. (SBU) The CCC was advocating a Constitutional Assembly as the proper means to amend the constitution - with members selected through direct popular vote, delegates from Ukraine's regions, and representatives of the major political forces. As Kohut described it, the Assembly would draft the new version of the constitution, or have a group of experts draft it, and put it up for approval by referendum.

¶12. (SBU) Kohut, Horbach, and Koliushko all agreed that in order to make a Constitutional Assembly a reality, there needed to be a constitutional amendment creating and empowering such a body, thereby requiring Rada support and cooperation. (Embassy Note. The current constitution only addresses how to deal with amendments, not the drafting of an entire new constitution. Therefore, a constitutional amendment is not required to call a constitutional assembly; however, its advocates believe that this is one way to ensure its legitimacy. End note.) However, none were certain how enthusiastic the Rada was about this plan. Koliushko estimated that they currently had the backing of a couple dozen MPs. He thought that an easier alternative might be for the Rada to adopt a law on writing a new constitution, because a law would only require a simple majority vote, whereas a constitutional amendment required a two-thirds majority.

¶13. (SBU) Horbach said that the CCC was meeting once every week or two to talk about their strategy. Koliushko said that the CCC planned to hold round tables in Ukraine's eight largest cities between February and May -- funded by the Soros-backed Renaissance Fund -- to discuss constitutional reform with civic organizations, local NGOs, local political forces, and constitutional law departments in universities. Koliushko acknowledged that if political parties do not participate, it could undermine their whole effort. However, he said that if they can build a groundswell of support it may force the Rada and/or President to agree to their proposal for a Constitutional Assembly. Horbach acknowledged that the process would take a long time. (Note. Just to amend the constitution to allow for the Constitutional Assembly would take until fall 2008 at a minimum. Then they would need to organize elections for its members. This could easily be a two-to-three-year process. End note.) Thus, they believed, the presidential team would move ahead with its own shorter agenda and timeline.

Multiple Drafts Already Prepared

¶14. (C) Complicating this process may be that many people are trying to author new constitutions. Last summer, Deputy Secretariat Head Bezsmertniy passed the Ambassador three

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different drafts based on different Western models. Horbach told us that he knew of two drafts currently under consideration by the Secretariat. The first was written by a group led by current CEC head and former CC judge Shapoval. The second was more radical and more strongly pro-presidential and was written by a group that included

Stavnichuk. In addition, constitutional law expert Rechytskiy, a former Fulbright Scholar based in Kharkiv, told us in October, 2007 that he had prepared a draft of the constitution for the Kharkiv Human Rights Group. Shortly thereafter, he was invited to the Secretariat, where Deputy Head Pukshyn gave him \$10,000 to modify his draft and produce a short outline for the President and a longer concept paper for Secretariat experts. According to Rechytskiy, Pukshyn had told him they wanted an alternative draft to one already being worked on by experts and that they did not want to involve "old-school" constitutional lawyers, such as Shapoval. Horbach also said that lots of experts and political forces were also writing their own constitutions, which would just increase the level of competition.

What People Are Advocating

¶15. (SBU) Rechytskiy told us that the draft he gave to the Secretariat favored a strong presidential system, a bicameral

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legislature, and removing all the social-economic language from the constitution in favor of focusing on fundamental rights and freedoms -- something similar to the U.S. model. Koliushko told us that he believed Ukraine needed to keep its mixed parliamentary-presidential system -- to move to one or the other would be dangerous. However, the powers and responsibilities of the different branches could be clarified. The entire Cabinet should be selected by the Rada -- even if the President retains the right to make nominations for FM and DefMin, they should not be binding on the coalition. In turn, it should be clear that the President is the Head of State. Koliushko would also give the judiciary more power to select its own judges or have a say in the senior judicial nominations made by the President and parliament.

¶16. (C) Opposition leader Yanukovych told the press that he thought decentralization of power was a key element for constitutional reform. (Note. Although it is generally agreed that Ukraine needs to devolve a lot of powers and responsibilities from Kyiv to the regional level, it is not surprising that Regions would advocate a more federal system, given that their power is based in a specific part of the country -- regions that control much of Ukraine's wealth. End note.) Yanukovych also called for a bicameral legislature.

¶17. (U) Visit Embassy Kyiv's classified website:
www.state.sgov.gov/p/eur/kiev.
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